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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE MATTER OF

PREEMPTION OF STATE AND :
LOCAL ZONING AND LAND USE :
RESTRICTIONS ON THE SITING, : MM DOCKET NO. 97-182
PLACEMENT AND CONSTRUCTION :
OF BROADCAST STATION :
TRANSMISSION FACILITIES :

TO: THE COMMISSION

**COMMENTS OF THE HAMPTON ROADS PLANNING
DISTRICT COMMISSION ON THE PROPOSED RULE MAKING**

INTRODUCTION

The Hampton Roads Planning District Commission (the "Planning District Commission") is a regional body comprised of fifteen cities and counties in the area of southeast Virginia known as Hampton Roads. Its membership is diverse and includes suburban and even rural counties, large urbanized cities like Virginia Beach, Norfolk, and Newport News and other jurisdictions, like the City of Williamsburg that are nationally recognized as important historical sites. Although not one of the top thirty television markets, the population of the area is about 1.5 million and growing rapidly; the primary employer continues to be the Federal Government and many related industries. This economic base has led to the development of an advanced telecommunications infrastructure. All members of the Planning District Commission have this as a goal of their comprehensive economic and cultural planning.

The comments of the Planning District Commission are certainly not designed to stifle technology, but rather to persuade the FCC to recognize the need to balance the

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benefits of DTV with other critical public interest considerations. The member cities and counties must balance the goals of supporting advancing technology with their other goals, including their representation of the interests of their citizens in a democratic society.

The Planning District Commission serves as a tool to facilitate and coordinate common regional matters such as transportation improvements (highways, tunnels, bridges, and transit, including their funding), economic forecasting, protection and enhancement of the environment (the Chesapeake Bay is a critical area of the Commission's work), and more recently, the resolution of the many issues presented by the rapidly advancing telecommunications industry. As to the latter, the Planning District Commission has served as the forum where the telecommunications industry and the member jurisdictions discuss their needs in light of the Telecommunications Act of 1996. This has led to better understanding of their respective interests and even to model regulatory and zoning ordinances that provide the public with a meaningful way to air their concerns and provide the industry with an efficient process responsive to their "bottom line."

The comments of the Planning District Commission are set out below grouped by the key aspects of the rule proposed by the industry.

TIMING

Each local government has its own land use controls and, subject to appeal in the courts, the governing body is typically the final authority for the approval or denial of a request to construct a tower in a particular location. Although the process for approval may differ from jurisdiction to jurisdiction, there are common characteristics which,

when understood, show that the rapid approval process under consideration is simply unreasonable and will likely be impossible to meet in many instances.

Virginia statutes require each local government to enact a “comprehensive plan” which is a guidance document for the orderly and harmonious development of land in the community. These plans must be updated every five years at a minimum and in the case of the Planning District Commission, the members have been provided the model telecommunications ordinances and planning materials and most members have incorporated them into their local laws. Thus the districts where towers can be located (typically in industrial and commercial districts as opposed to residential, park or historic districts) has been anticipated and mechanisms are in place that allow for the expeditious consideration of a particular request which is usually called a “conditional use permit.” This process allows for public comment and authorizes the approval body to place reasonable conditions (screening or a modification of the site in some other way, for example) to mitigate adverse effects of a particular use. Rather than stalling as the industry would have the FCC believe, local governments are acting quickly to provide mechanisms for consistent, prompt and efficient review of tower requests.

Some situations will take longer than others. For example, if the zoning code in a particular case does not permit the use of land for a tower, *e.g.*, the requested site is in a residential area, the zoning code would have to be amended. Under state law, this would require advertised public hearings by both the local planning commission and the local elected body.

The local planning commission is a volunteer organization which may only be able to meet once or twice a month. The application would have to be reviewed for such

things as technical compliance, conformity with the adopted comprehensive land use plan for the community, and the scheduling of the required hearings and the placement of advertisements in local newspapers. Due process guarantees of the Federal Constitution and Virginia Constitution, not to mention the statutory and ordinance requirements can cause this process to take several months. The local elected body also meets only several times a month, often with a crowded agenda of items. In order for such a request to receive a fair hearing with opportunity for proper staff preparation and community comment, additional weeks or more are involved.

Assuming the zoning code allows a tower by the issuance of a "conditional use permit, *e.g.*, a commercial or industrial district where a tower already exists consistent with the comprehensive plan and zoning code, the local review process would be quicker but there would still be a need for an administrative review, scheduling of hearings, and advertisement for the benefit of the public and adjacent land owners or residents. Although quicker, the approval bodies are also volunteers and notice to be meaningful must provide sufficient time to review the submissions.

The commercial providers of the DTV in the Hampton Roads area will have until May 1, 2002, and noncommercial providers until May 1, 2003, and yet the local governments have only from three to six weeks to complete review and approve or deny the request. Of course, the proposed time frames for review of dislocated radio and other current tower users are also so short as to be tantamount to complete preemption of any meaningful review by local governments.

Finally, the proposed five days to complete the development of the written record in the case of a denial but thirty days for an aggrieved applicant to file an appeal is

arbitrary and unfairly discriminatory. Many local bodies will take an action and during the time between that vote and next meeting (often two weeks or a month), the record is reviewed and reduced to writing and confirmed at the subsequent meeting. This is a protection for the applicant as well as it assures a complete and fair record, but this option is precluded given the proposal of allowing only five days in the case of a denial.

SCOPE OF THE PROPOSED RULE

The proposed rule not only would preempt local review of towers but also the buildings that are often placed with a tower. These supporting buildings and other structures can be quite substantial. In the Hampton Roads area there will be multiple towers that will be allowed to be placed wherever the broadcasters choose without any regard for their impact on the contiguous community or to the conformity to the planned development of the respective communities.

Some jurisdictions have anticipated the need for the towers and there are districts where they are permitted. The careful consideration and good planning of local governments would be wasted if preemption is granted, this would be the case without any significant showing of factual situations demanding this result.

The proposed rule would even exempt radio towers when similar structures operated by others are not exempted. It is not possible at this time to know how many radio towers might be affected by this rule, but given the many stations in the Hampton Roads area, the impact of wholesale preemption is a very disturbing possibility. And add to this aspect of the proposal the denial of local governments ability to require or even encourage collocation, there is a high probability the public will suffer from an unnecessary proliferation of towers.

SAFETY AND HEALTH

The Hampton Roads area has many airports (civilian and military) and other transportation facilities which have long range plans for their future development. These plans do not arguably present immediate health and safety reasons for a denial. But these plans could easily be damaged if towers can be erected in a manner that frustrates the long term plan. The economic and practical consequences to the future development of needed public infrastructure by a poor placement for short term gain can be devastating; this should not be permitted. Of course, each locality has its own “blueprint” or guide for its comprehensive development, all of which is negatively impacted if towers of the size under consideration is eliminated from meaningful review at the local level.

The same is true for the impact upon environmental assets like the Chesapeake Bay. It is not an exaggeration to say that every use that disturbs land can adversely affect the health of the Bay in the long term. The preemption proposed makes it impossible to determine the impact of a proposed tower and its associated structures. In a similar way the impact upon historical assets must be undertaken and yet the proposal would eliminate this level of review. The specter of a tower looming over of historic Williamsburg is quite possible given the proposed limitations on local and land use review.

RESOLUTION OF DISPUTES

Disputes involving land use matters are best resolved in the court system. They are uniquely local matters. The Virginia judiciary frequently resolves land use disputes including those where federal laws are involved and they do so expeditiously; the courts are able to resolve the often intricate factual and legal situations and they have a full array

of tools available, such as injunctive powers, that they can employ to protect the parties. There is no body of evidence showing to need to strip the courts of their role and indeed it would be counterproductive. Given the countless factual situations that are likely to occur and the disputes that may arise, the FCC could be overwhelmed with matters that involved the details of local land use laws, details well known to the state judiciary. In fact, the local courts can likely resolve land use disputes far quicker than the FCC.

Granting the FCC jurisdiction or even granting it to alternative dispute resolution mechanisms is quite contrary to the expressed intent of the Congress when it enacted the 1996 Telecommunications Act. Usurpation of local judicial authority is both unwise and unfair. There is no need for the FCC to take on such an enormous task and there is no need that these uniquely local matters be “harmonized.”

CONCLUSION

The promise of the new technology of digital television is exciting and the members of the Hampton Roads Planning District Commission share the excitement and the vision. The Planning District Commission has worked hard for years at establishing a dialogue with the industry and it has redoubled that work in the development of model telecommunications ordinances for its members. But in its zeal to put this new technology in place, neither the Industry nor the FCC should ignore or minimize the interests of the very public this technology was designed to serve. The virtual abandonment of land use planning in response to an ill advised and unsubstantiated attack on local governments by the industry should not be embraced by the FCC. Planning and zoning are much more than “aesthetics,” they are the democratic tools by which a community defines itself and makes itself a pleasant place to live and to work.

Respectfully Submitted,

THE HAMPTON ROADS PLANNING DISTRICT
COMMISSION

By Counsel

A handwritten signature in cursive script that reads "David R. Lasso". The signature is written in black ink and is positioned above a horizontal line.

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